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ARTICLES

Dangerous Games and the Criminal Law

DANIEL B. YEAGER

A man's relation to his own acts is quite different from his relation to the acts of other people.¹

I Introduction

This essay means to correct the ways in which the law of homicide deals with lucky winners or survivors of dangerous games that end in the deaths of unlucky (dead) "losers" or even unluckier non-participants. Drag racing and Russian roulette are my focus, not only because they are so frequently litigated, but also because most other (unlawful) excessive risk-taking ventures are not, grammatically, what we mean when we say "game."² It is not so much my intention to evaluate the role that "moral luck" plays generally in the world or specifically in the criminal law.³ It is my position that in the notorious risk-versus-harm debate, harm or consequences *should always* matter in assessments of blameworthiness—that is, those would-be wrongdoers who "luck out" and cause no harm or less harm than they set out to are less deserving of blame than are those criminals who accomplish what they put themselves to. Within the confines of that debate, my point here is self-consciously narrow: that while lucky survivors of dangerous games may well be *in a sense* responsible for the death of co- or non-participants, winning at drag racing or Russian roulette is not, except under the greediest notions of causality or complicity, an instance of homicide unless the survivor coerces, bumps,⁴ manipulates,⁵ or otherwise "helps" the killer's deadly actions.

So just how *are* lucky survivors of dangerous games responsible for what they have done if they have killed no one? Quite simply by their having to accept the consequences of their actions, even though by pleading

justification or excuse (including lack of causality) they often have a way of getting out of being *held* responsible. For example, when in practice, Los Angeles Clippers' star basketball player Danny Manning blew out his knee when he inadvertently stepped on teammate Joe Kleine's foot, Kleine felt terrible.⁶ Kleine's massive dose of "agent-regret" persisted even though it was not really Kleine's fault—after all, he was just standing there. But Kleine was quite human to feel regretful when he linked Manning's injury with his own (passive) role in the episode. Was he responsible for what happened? Partly, at least. Who else, if not him? Will we *hold* him responsible? No; we exculpate him because at worst he was clumsy, which makes him not blameworthy, though he may never forgive himself for having played *some* role in the suffering of another.

A merely clumsy agent lacks awareness of the excessive nature of his risk-taking. Awareness of what one is doing normally is a necessary and sometimes sufficient condition of criminal responsibility. In those instances, when an agent is more than clumsy—when he is aware of or indifferent to the risks he poses to persons or their property, even when he causes no palpable harm—there are offenses that make him criminally responsible solely for the threat or danger he poses. Reckless endangerment,⁷ solicitation,⁸ conspiracy,⁹ orthodox conceptions of attempt,¹⁰ possessory offenses,¹¹ dilute forms of assault,¹² perhaps even burglary,¹³ to name a few,¹⁴ are crimes that illustrate legislatures' intention to punish inchoate, anticipatory, or "nonconsummated"¹⁵ actions of offenders, who betray their "subjective" (intended) as opposed to "manifest" (actual, or harm-causing) criminality.¹⁶

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Any homicide, however, not only requires a corpse, but requires as well (sometimes imputed)¹⁷ conscious excessive risk-taking *and* causality. Accordingly, if certain dangerous games are socially undesirable (and what could be gained by them other than excessively risky forms of self-indulgence?), then the solution is not to stretch notions of causality or complicity all out of shape (as we tend to do), but to legislatively increase the expected punishment costs for the lucky participants.¹⁸

Currently the legislatively imposed expected punishment costs to dangerous-game players are jarringly low. For example, California's massive Vehicle Code, which in its *abridged* edition spans 250 pages of microprint, nowhere mentions drag racing, but it does punish with a maximum \$500 fine an infraction committed by (even recidivist) drivers who exceed 100 miles per hour.¹⁹ For the protection of society, these speedy drivers may get their licenses suspended. So too, is the Model Penal Code's catch-all risk-prevention provision—reckless endangerment—a mere misdemeanor.²⁰ In fact, not only is *playing* Russian roulette noncriminal, but the game is played so that, according to at least one court, lucky players never gain sufficient control over the weapon to

be convicted even of "carrying a firearm."²¹

Thus if the social evil in dangerous games is that too frequently they are fatal, then we should at the very least criminalize the underlying activity and consider increasing the sentences for the survivors of already criminalized activity—whether or not a death occurs—though it would be ludicrous to punish them more severely than, or even as severely as, the unlucky participants. After all, when death does occur, the survivor has a ready (if only partial) excuse, which should send him "out of the fire into the frying pan—but still, of course, any frying pan in a fire."²² The survivor's partial excuse? He was lucky; he was "good"; he *killed* no one.

The 50 or so appellate cases on point, however, are all over the lot. When they hold the lucky accountable, they do so via one of two equally motley doctrinal strategies: (1) lucky survivors are the proximate cause of deaths that result from the game; or (2) lucky survivors are complicit in or accomplices to the fatality. Neither theory of description accurately assesses a lucky survivor's role in unfortunate fatalities. The purpose of this essay, therefore, is to put a stop to the mauling of these two doctrines in dangerous-game cases.

II Dangerous Games and Causality

What we do in the world depends on the world as well as on us.²³

First let me make clear what is and is not a "game" and why it matters. The distinction matters because it is the *competition* that makes plausible (though *merely* plausible in my view) the claim that a lucky risk-taker can be blamed for the acts of an unlucky risk-taker. For example, imagine two people in separate rooms, houses, or even cities, each unaware of the other. Were each to put a bullet in a gun, spin the chamber, and pull the trigger, no one would say that, were one to live and the other to die, the lucky survivor is in any way responsible for the actions of the unlucky deceased. So too, were two drivers to speed—*coincidentally*, not in concert—it would be nonsense to say that the speeder who avoids running over a pedestrian can be blamed for the actions of the speeder who runs over a pedestrian. If not for the pressures and coordination of competition (or "concerted activity," if you will)—for the fact that one player acts *because*, not *despite the fact that*, another player acts—then we would have even less than we do on which to base the lucky player's liability for the acts of the unlucky player.

Accordingly, autoerotic asphyxiation is not a game because it is masturbatory, and so *tends* to be performed in solitude.²⁴ Nor is drug- or alcohol-ingestion a game, given that even in group settings intoxication is fundamentally social, not competitive, and is directed at euphoria or self-forgetfulness, the risks of which are but externalities of the activity. While admittedly in ordinary language we do refer to *solitaire* as a "game," I think it is fair to say that the dangerous games that concern the criminal law are inherently competitive and take at least two willing players, each of whom assumes the risk that he will kill *himself*.²⁵

Commonwealth v. Malone,²⁶ for example, is not a dangerous-game case because only Malone was playing. He put a gun to his thirteen-year-old "friend's" ribs and pulled the trigger three times. On the third pull the five-chamber gun discharged, and after the apparently remorseful Malone apologized ("Gee kid, I'm sorry"),²⁷ his friend died. Malone's defense was that he had positioned the single bullet so that the gun would not fire

until the fifth pull on the trigger. He was wrong. By the Pennsylvania Supreme Court's calculation, the probability of death (regardless of where Malone thought the bullet was) made him a murderer. Because Malone's life was never in danger, there was no game because he had rigged the activity to place only the deceased at risk.²⁸

Currently the legislatively imposed expected punishment costs to dangerous-game players are jarringly low.

Driving too fast is not a game, unless flirting with the possibility of apprehension by police is what we mean by "game."²⁹ Drag racing, however, is a game. James Dean drag raced in Nicholas Ray's *Rebel Without a Cause* (1956). The foolhardiness of the activity was not lost on Dean when he faced his adversary "Buzz" before the race, with Dean's aversion to being called "chicken," the devotion of Natalie Wood, and the avoidance of boredom at stake. After rejecting his father's wimpy waffling in response to Dean's question whether Dean should "do this thing that was . . . very dangerous, but it was a matter of honor and you had to prove it," Dean was confronted by Buzz at the bluff for a deadly game of "chickie." The rules laid down by Buzz were clear: "She [Natalie Wood] signals; we head for the edge and the first man who jumps is a chicken, alright?" Though he willingly participated, Dean felt agent-regret (as he should—he is only human) when Buzz's car dropped "over the edge" to "the end" when his sleeve got caught on the door handle, preventing his timely bailing out of his car.

If we want the criminal law to force the young, the bored (boredom is said to explain author Graham Greene's "youthful experiments" with Russian roulette),³⁰ the idle, the conflicted, and the macho to foreclose on director Ray's brand of quasi-nihilism in favor of more productive activities, then there must be a better way of doing so than by saying that Dean and others similarly situated somehow "killed" Buzz and his analogues. But the law sees this quite obvious point far too erratically to avoid critique. If I understand Professor Crocker on this point, he would say Dean did kill Buzz on the rather odd ground that because the rules of the game were obeyed, Dean assumed risks not only to himself, but to all others who played fairly,³¹ or, for

Professor Dressler, who concurs with Crocker, to all others who did not "'ad lib.'"³²

That position on the issue of causality in drag-racing cases is stated in the dissenting opinion (in favor of liability) in *Commonwealth v. Root*:³³

The race, the attempt to pass the other car and forge ahead, the reckless speed, all of these factors the defendant himself helped create. . . . That the victim's response was normal under the circumstances, that his reaction should have been expected . . . is to me beyond argument. That the defendant's recklessness was a substantial factor is obvious. All of this . . . makes his unlawful conduct a direct cause of the resulting collision.³⁴

The majority, contrariwise, ruled against liability on the part of the lucky player:

[T]he deceased was aware of the dangerous condition created by the defendant's reckless conduct in driving his automobile at an excessive rate of speed along the highway but, despite such knowledge, he recklessly chose to swerve his car to the left and into the path of an oncoming truck, thereby bringing about the head-on collision which caused his own death. . . . [T]he defendant's reckless conduct was not a sufficiently direct cause of the competing driver's death to make him criminally liable therefor.³⁵

Borrowing from the *Root* dissent, the Iowa Supreme Court later ruled in *State v. McFadden*³⁶ that a "sufficient causal relationship" is good enough for tort and criminal regimes. In *McFadden*, Sulgrove, McFadden's unlucky opponent, "lost control of his automobile and swerved into a lane of oncoming traffic, where he struck a lawfully operated northbound vehicle . . . [that] contained a six-year-old passenger, Faith Ellis, who was killed in the collision along with Sulgrove."³⁷ McFadden's conviction on two counts of manslaughter was affirmed.

McFadden not only botched its holding, but by launching into a lengthy and unhelpful discourse on causation, that court, much like the court in *Root* (and far too many others), failed to engage the real issue. For example, *McFadden* relies on a passage from another drag-racing case, *Commonwealth v. Peak*,³⁸ which is a clear and high example of how dangerous-game cases invoke descriptions of causality that are simply false to the way we (should) think about homicide:

Defendants, by participating in the unlawful racing, initiated a series of events resulting in the death of Young. Under these circumstances, decedent's own unlawful conduct does not absolve defendants from their guilt. The acts of defendants were contributing and substantial factors in bringing about the death of Young. The acts and omissions of two or more persons may work concurrently as the efficient cause of an injury and in such a case each of the participating acts or omissions is regarded in law as a proximate cause.³⁹

This may be hornbook law in tort⁴⁰ or criminal law,⁴¹ but the real issue gets lost in this legalese, which is made no better by the heralded⁴² Model Penal Code, which excludes from its causal reach only the “too remote or accidental.”⁴³ Given that, unlike moral blameworthiness (of which Peak had plenty), causation is a *substantially* mechanistic, not normative concept, the real issue is whether the lucky Peak in any meaningful sense of the word “killed” the unlucky Young, which he did not.

Thus the *Root* majority was definitely onto something in acquitting the lucky Root, but the opinion is needlessly distracted by the ineptitude of the deceased. Whether *Root* would have been decided identically had the deceased been a better racer and killed another driver, passenger, or pedestrian who lawfully crossed paths with the racers is unclear. In other words, I am unsure whether *Root* depends on essential differences between tort and criminal notions of causation by identifying a too fine-grained distinction between “direct” and “substantial” contributions to outcomes, or whether it was condemning the deceased for being an unskilled racer who did only himself in. Again, put slightly differently, would *Root* have come out the same way had a nonparticipant gotten killed? And what if the unlucky or inept player also had gotten killed, leaving us with “no body to kick; no soul to damn”?⁴⁴

*Foggy if not meaningless distinctions
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The dangerous-games cases reveal that the death of a nonparticipant is by no means uniformly viewed as a particularly salient fact.⁴⁵ For example, in *State v. Shimon*,⁴⁶ two teenagers, Johnson and Shimon, were drag racing at speeds over 100 miles per hour when Johnson’s car spun out control, twice sideswiped Shimon’s car, killing neither driver nor either of Shimon’s passengers, but killing both of Johnson’s passengers, whom the Iowa Supreme Court said were killed as much by Shimon as by Johnson. Its reasoning? The doctrine of “concurrent causation” refuses to “shield . . . a wrongdoer” unless the “intervening cause” (Johnson’s bad driving) “were the sole proximate cause of the accident,” which, due to Shimon’s “joint participation,” it was not.⁴⁷

A California case was equally indifferent to the role of luck or contingency when it concluded that the deceased (Sena)—a presumably law-abiding driver—was killed after his car burst into flames when struck by the unlucky racer (Turner) into whose lane Sena had crept at ten miles per hour. The lucky racer (Attebery), also a named defendant in this wrongful-death suit, was, one would think to his benefit, driving a slower car three or four car lengths *behind* Turner when Sena’s car appeared on the scene. Attebery, zooming along at over 80 miles per hour, managed “to drive through the flames between the two automobiles and escaped colliding with either”⁴⁸ before stopping about 200 feet down the road, apparently by slamming into a street sign. The Court’s refusal to relieve Attebery on causal grounds was, to say the least, quick: Attebery’s claim that his conduct “was not a proximate cause of the collision . . . is clearly devoid of merit, since there was evidence that the race was in progress immediately prior to the time of impact and this factor alone could constitute proximate causation.”⁴⁹ The court did not elaborate.

That Attebery’s was a civil case is, or at least should be, inconsequential. Foggy if not meaningless distinctions between but-for, direct, proximate, substantial-factor, and concurrent causation pervade the law, despite the capital invested (that fails to repay even the most attentive reader) in identifying a sense of “cause” that will do for torts, but is too broad for crimes.⁵⁰ Indeed, many of the dangerous-game cases I found were civil actions,⁵¹ often, as with Attebery’s, tort suits brought by the loved ones of the unlucky,⁵² or contract suits brought by beneficiaries against the insurer of the unlucky.⁵³ Despite civil law’s inability to tell us a thing about blame, and despite the criminal law’s blame-orientation (which makes no claim to return plaintiffs to *status quo ante*), the civil cases are equally instructive on causality, a concept that cannot lightly carry an ordinary (tort) and special (criminal) sense: not without more explanatory power than I have seen in the statutes,⁵⁴ cases,⁵⁵ jury instructions,⁵⁶ or academic commentary.⁵⁷

So was *Root*—which absolved the lucky or deft drag racer of blame—at bottom a case about an (opaque) special sense of causality reserved for the criminal law, or was it about the role of luck, that is, lack-of-causation-as-excuse? Or, as at least one court gleaned from it, was *Root* about the role of *skill*: actions and their consequences over which the agent has “control”?

Although due to countless contingencies all we really can control in the world is our intentions,⁵⁸ “control” over outcomes does make a difference to blame in the

law's eyes. Shortly after *Root*, the Massachusetts Supreme Court upheld James Atencio's conviction for the manslaughter of Stewart Britch, with whom Atencio played Russian roulette (along with one Marshall, who was also convicted). Oddly, were *Atencio* a civil suit, the court would have dismissed it on the ground that the deceased's act of putting a loaded gun to his head and firing it was an intervening, causal-chain-breaking, voluntary act.⁵⁹ But somehow the criminal posture of the case gave "the Commonwealth . . . an interest that the deceased should not be killed by the wanton or reckless conduct of himself and others. . . ."⁶⁰ To bolster its conclusion, the court insisted that this was "one 'game' of Russian roulette": not "three 'games' of solitaire."⁶¹

From there *Atencio* turned to the highly relevant if not dispositive role of skill in certain dangerous games, a distinction we are told may support nonliability (as in *Root*), as opposed to games in which the players give themselves over to luck, where winners do nothing to deserve credit or praise for outcomes, but get loads of blame if things turn out unexpectedly badly.⁶²

Atencio may be a nominally adequate defense of the lawfulness of skydiving, boxing, and the Indianapolis 500, but (1) it flunks any sensible test of causality in homicide prosecutions; and (2) its luck/skill dichotomy is flatly counterintuitive.⁶³

Causality in tort or crime is not a "policy" decision

(though in hard cases it can be *treated* as one); in the core cases it is an assessment of the mechanics of human action. Accordingly, unless a player in these cases runs over, crashes into, or shoots a victim, he has not, except in the most etiolated sense of the word, "killed" anyone. Moreover, unless a player pushes, bumps, nudges, tricks, or coerces the *killer* into playing and killing either the killer or someone else, we cannot fairly attribute the killer's act to a mere player.⁶⁴

As for the luck/skill dichotomy, drag racing is in a sense based on power—it *conscripts* the unwilling—law-abiding drivers, (some) recalcitrant passengers, and pedestrians—to take chances with the players. Because the chances the racers take endanger those who lack interest in sharing the adventure, the racers are by no means free from morality—from condemnation for untoward outcomes visited on the unwilling. If the analogy is apt, and I am not sure that it is, *each* Russian roulette player takes chances that are, like an artist's,⁶⁵ truly his own, and are shared only by those who have accepted contingency for themselves.⁶⁶ Thus, assuming as I do that Russian roulette rarely if ever kills the "wrong" person (that is, someone other than the shooter), these so-called "luck"-based games—like the new adolescent obsession with "elevator surfing"⁶⁷—whose risks are shared only by the invited, should cut, *if anywhere*, against, not toward, liability.⁶⁸

III Dangerous Games and Complicity

Having "resolved" the causal question, the *Atencio* case devolved into a pastiche of mis-statements about the law of complicity, which is the second doctrinal basis by which lucky (or skilled, if you think it makes a difference) players in dangerous games are held criminally liable for the deaths of unlucky co-participants, passengers, law-abiding drivers, or bystanders.⁶⁹ Under such a theory of complicity we dub the lucky survivor what the law calls an "accessory," "accomplice," "aider and abettor," or "secondary party" to the homicide. Simply stated, the law of complicity treats someone who helps someone else commit a crime as though the helper himself committed the crime. If the "principal," "perpetrator," or "doer" commits a crime, then equal blame goes to the helper as well, provided that the crime which occurs is one the helper knew about and whose success the helper intended when he provided his encouragement or assistance.⁷⁰

"Causal" is a popular but specious way of describing the helper's relation to the principal. Certainly one can perform an action by getting others to perform it. "We say, for example, 'Louis XIV built Versailles,' even though the actual construction was not done by him."⁷¹ Indeed, we can think of cases in which the principal is not a principal at all, but is simply, perhaps metaphorically, a tool, instrument, or means of someone else, such as when the helper recruits a lunatic or a child to do the deed. But those cases involve, or should involve, such coercion or manipulation that the would-be principal's act is fishy enough to be called "nonresponsible" or "nonspontaneous." For another's action to be mine, I must act in a way that shows that I see it as such; it would be ungrammatical to say someone could "use" someone else inadvertently. Were, I, for example, to pay you to paint my house, it is not as though I see myself painting the house—I see you doing it. The only evi-

dence of my seeing myself doing it would be my placing such constraints on your autonomy, or my knowingly exploiting your *ex ante* lack of autonomy, that it ceases to be your spontaneous act. Thus if I were to force or even gently ask my young son to paint my house, then I have painted my house through my son. I likewise would act through you were I to hand you a package into which I have secretly put a bomb for delivery to a victim I have in mind, or were I to place you under duress by threatening you with a greater harm if you do not act on my behalf than if you do.⁷²

*There is nothing in well-settled principles
of complicity that can reach the lucky
survivors of dangerous games.*

But while in garden-variety cases of complicity the relation between the parties is nothing like that, a host of leading commentators⁷³ see a "sort" of causal contribution as the essence of helping. Their view justifies treating dangerous-game cases as instances of complicity on the part of lucky survivors. Professor Kadish has specifically resisted doing so in dangerous-game cases, but on the ground that the lucky participant's attitude toward the harm is usually too dilute or indifferent and as such lacks the intentionality toward untoward outcomes that complicity doctrinally requires.⁷⁴

Yet not only are garden-variety complicity cases unable to carry the heavy normative load with which courts and commentators have burdened the separating of conditions from causes, but there is *nothing* in well-settled principles of complicity that can reach the lucky survivors of dangerous games. Nevertheless, it was on a theory of complicity that Atencio and Marshall were held liable as the manslaughterers of Britch (who shot himself in the head). In a somewhat unsophisticated account of complicity, the Massachusetts Supreme Court explained:

There could be found to be a mutual encouragement in a joint enterprise. . . . [T]here may have been no duty on the defendants to prevent the deceased from playing. But there was a duty on their part not to cooperate or join with him in the "game." Nor, if the facts presented such a case, would we have to agree that if the deceased, and not the defendants, had played first that they could not have been found guilty of manslaughter. The defendants were much more than merely present at a crime. It would not be necessary that the defendants force the deceased to play or suggest that he play.⁷⁵

Even if we could distinguish games that require skill or judgment from luck-based games (and where would, say, gambling, fall on this spectrum, were it to matter?), the passage quoted above not only is a spurious interpretation of the operation of complicity in Russian roulette cases, but has been extended to drag racing as well, which we are told is a game of "skill."

For example, in *Jacobs v. State*,⁷⁶ Jacobs was one of three racers on a two-lane highway. He led Kinchen and Carter in their proper lanes, all three at excessive speeds. Kinchen decided to pass Carter at the crest of a hill by pulling into the left lane, where he crashed head-on into a lawfully operated car, thereby killing himself and the other driver, William Buck. The wrinkle there was that Jacobs was a quarter mile *ahead* of his co-participants when the crash occurred. Again, complicity was the basis of Jacobs's conviction. The supporting language from the Florida appellate court should be by now familiar: "The deaths which proximately resulted from the activities of the three persons engaged in the unlawful activity of drag racing made each of the active participants equally guilty of the criminal act which caused the death of the innocent party."⁷⁷

New York then piled on in *People v. Abbott & Moon*,⁷⁸ a case quite similar to *Jacobs*. Moon was drag racing with Abbott, who killed Patricia Hammond and her two passengers, who had entered the intersection through which Moon was racing at 80-85 and Abbott at over 90 miles per hour at the time of the wreck. Although Moon was driving like a maniac, he was lucky enough to avoid contact. Abbott's liability was obvious. Moon's conviction of criminally negligent homicide and reckless driving was upheld on appeal, again on the grounds of complicity:

While Moon did not personally control Abbott's vehicle which struck and killed the three victims, it could reasonably be found that he "intentionally" aided Abbott in the unlawful use of the vehicle by participating in a high-speed race, weaving in and out of traffic, and thus shared Abbott's culpability. . . . Moon associated himself with the high-speed race on a busy highway and took a part in it for nearly two minutes over a distance in excess of one mile. Actually his conduct made the race possible. He accepted Abbott's challenge and shared in the venture. Without Moon's aid Abbott could not have engaged in the high-speed race which culminated in the tragedy.⁷⁹

For this reading of complicity the New York appellate court cited criminal-law guru Wayne LaFare, who has conceded that such a view "has much to recommend it."⁸⁰

Though this mode of reasoning about the complicity of Atencio, Jacobs, and Moon in the fatalities that arose

out of their excessive risk-taking may have an elemental appeal (they are, after all, wrongdoers), it is analytically impossible. Consider again the passage quoted above from *Abbott & Moon* where the court observed: "*Actually, [Moon's] conduct made the race possible.*"⁸¹ Indeed it did, and this is precisely *why* each racer is analytically precluded from helping or being complicit in the race. As I have argued here on another occasion, "help can be withheld, or it wouldn't be helping at all."⁸² In other words, because the relation of helping (unlike doing or perpetrating) to the ultimate harm is synthetic, not analytic, the actions of helping and doing are distinct and should be so treated.⁸³ Thus if the crime analytically, elementally, or definitionally *requires* two or more parties, then the required parties cannot, merely by participating, possibly "help" an activity to which *they are by definition essential*. Certainly a buyer does not help a seller in an exchange transaction by paying for goods any more than an unmarried person helps a bigamist by marrying him or her, a betrothed couple help each other get married by marrying, or someone helps someone else kiss simply by kissing them.

Here I am not talking about cases of "joint principal-ity," under which two parties divide the elements of an

Because the relation of helping (unlike doing or perpetrating) to the ultimate harm is synthetic, not analytic, the actions of helping and doing are distinct and should be so treated.

offense; for example, two parties rob when one commits the assault and the other the larceny. Since both the force or threat of force and the taking of property are analytically, elementally, or definitionally necessary to any robbery, neither party is *helping* robbery; both are *committing* it. Oppositely, where the help of one party is necessary only as an empirical or synthetic matter—that is, where a helper does not fulfill a statutory definition of a crime or one of its elements, but his actions *happen* to be necessary for the crime to succeed *on these facts*, then he is helping and not doing, regardless of how he may characterize his own actions.

For example, that a getaway driver may be necessary for a *successful* robbery must be observed to be known;

getaway drivers are not analytically necessary to robbery. Consequently, getaway drivers are helpers, not joint principals, regardless of how they may characterize their actions.⁸⁴ This is a point that is lost not only on courts, but also on Professor Fletcher, who, though he so often is right, wrongly finds cases of joint principal-ity "[un]workable" because it is sometimes "virtually impossible to quantify the degree of causal contribution" between, say, the person who supplies the murder weapon and the person who pulls the trigger.⁸⁵ There may be some puzzling instances of joint principal-ity, but Fletcher's is not an instance of joint principal-ity, let alone a puzzling one. The one who pulls the trigger kills; the supplier of the weapon helps.

Multi-party game cases, therefore, like exchange transactions, do not instantiate helping by one whose participation is analytically a necessary condition of the crime itself. This is not to say that drag racing and Russian roulette foreclose on the doctrine of complicity. Despite his well-intended (and mostly correct) dissent in *Jacobs*, Judge Carroll parodizes the idea that spectators cheering on a drag race could be liable for helping the homicide.⁸⁶ He may find the result absurd, but it happens to be the law, and a sensible one at that. The gaps in Judge Carroll's understanding of complicity could be filled by a glance at well-known decisions like *Wilcox v. Jeffrey* (where a magazine writer, for the purpose of writing about the performance, "helped" Coleman Hawkins play jazz illegally in the United Kingdom).⁸⁷ Cheering spectators *are* helping drag racing (as Natalie Wood so enthusiastically did in *Rebel*), and thus are complicit in the unlucky racer's demise. But a lucky drag racer who avoids disaster "helps" nothing.

Though American law insists on treating helpers and doers identically, the cheering spectators *should* have an excuse, albeit partial: they were *merely* helping. Not only is the lucky survivor helping nothing, but neither is he jointly principal in the homicide, given that manslaughter has two elements: (1) excessive risk-taking and (2) causing death. Manslaughter is not, analytically, a two-or-more-party offense; nor is it divided into one (you steer; I accelerate?) as obscene phone calling could be were one person to dial and the other to speak obscenely. Atencio, Jacobs, and Moon were charged with manslaughter, not with playing Russian roulette (Atencio), and drag racing (Jacobs and Moon). To use their necessary participation as a means of describing their role as that of helping the unlucky player's actions papers over the grammatical (and in my view moral) distinction between helping and doing.

Conclusion

Dangerous-game cases are, like most violence, for the young. They bespeak a mode of self-indulgence that should excite our indignation whether the games misfire or not. But homicide is in part a mechanistic, causal world, and lack of causation should be a (partial) excuse in such cases. Unfortunately, the criminal law takes an all-or-none, catastrophic approach to excuses, which only rarely sends the wrongdoer from the fire into the frying pan: indeed, voluntary manslaughter and diminished capacity are the only *partial* defenses I know of. As long as causality matters, the lucky, the skillful, the blessed—the survivors of dangerous games—should not be subjected to tortured or special senses of causation that still trade on the ordinary sense of the term.⁸⁸ If risk matters, then we should punish risk-takers as such, but only as such.

Nor is the expressive function of punishment served by doing violence to the already complex doctrine of complicity (again, in my view a plea for partial excuse) by conflating helping and doing, and by ignoring relevant distinctions between analytic and synthetic rela-

tions to outcomes—outcomes that inform whether and how one can live with oneself and with others.

Our gripe in dangerous-game cases, then, should be with the all-or-nothing nature of to-convict-or-fully-excuse and with the legislative failure to express sufficiently public indignation at the underlying behavior, with or without the consummated harm: here, death. The solution is not, to be sure, to fake and override what it means to cause or help untoward consequences, but to do what could only please subjectivists—punish excessive risk takers *qua* excessive risk-takers, and not to convert them through judicial ju-jit-su into harm-causers.

A lucky player should be (and is, unless strangely remorseless) thankful, whether to God or providence or whatever. Thankful for what? Thankful that he did not become what he had in him, and was ready to become: a killer of himself or another. What was within him was not *realized*, and so he has avoided an outcome at the level of action that would have irretrievably altered his relation with the world.⁸⁹ The distinction matters; it is, oweable entirely to him or not, his excuse.

NOTES

1 Winch, *Trying*, in *ETHICS AND ACTION* 130, 140 (D.Z. Phillips ed. 1972).

2 Lawrence Crocker has commented briefly on this topic, but his position is mostly descriptive and where it is not, in my view misses the mark. See Crocker, *A Retributive Theory of Criminal Causation*, 5 J. CONTEMP. LEG. ISSUES 65, 91-92 (1994). Sanford Kadish has criticized the law on point, but on grounds that are collateral to mine. See Kadish, *Complicity, Cause and Blame: A Study in Interpretation of Doctrine*, 73 CAL. L. REV. 323, 398-404 (1985). Law's leading casebooks and treatises raise more questions than they answer, see W. LAFAVE & A. SCOTT, JR., *CRIMINAL LAW* 297, 584-86 (2d ed. 1986); S. KADISH & S. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 611-19, 700 n.4 (5th ed. 1989); J. KAPLAN, R. WEISBERG & G. BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 347-48 (3d ed. 1996), when they answer them at all. Those who gloss over the issue altogether include G. DIX & M. SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS* 514-44 (3d ed. 1996); G. FLETCHER, *RETHINKING CRIMINAL LAW* § 5.2.2, at 360-72 (1978); P. JOHNSON, *CRIMINAL LAW: CASES, MATERIALS AND TEXT* 252-54 (4th ed. 1990); M. MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL LAW* (3d ed. 1996); P. LOW, J. JEFFRIES, JR., & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 1986); P. ROBINSON, *FUNDAMENTALS OF CRIMINAL LAW* 195-200 (1988). Those who do stake out a position do not present what

in my view passes for good argument, e.g., S. SALTZBURG, J. DIAMOND, K. KINPORTS, & T. MORAWETZ, *CRIMINAL LAW: CASES AND MATERIALS* 652-53 (1994). Even Hart and Honoré's 500-page *Causation in the Law*, see H.L.A. HART & A. HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985), devotes just one paragraph to games, and there only to briskly endorse a single judicial decision. *Id.* at 350. Hart and Honoré do refer to a game of "chicken," but there both players, equally at fault, crash head-on; each survives, but both has a passenger who does not. *Id.* at 218.

3 E.g., Williams, *Moral Luck*, in *MORAL LUCK: Philosophical Papers* (1973-1980) 20 (1981); T. NAGEL, *MORTAL QUESTIONS* 24 (1979); Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEG. ISSUES 237 (1994); Sverdlik, *Crime and Moral Luck*, in *MORAL LUCK* 181 (D. Statman ed. 1993); Winch, *supra* note 1.

4 See *State v. Roark*, No. 86-267-III, 1987 WL 14069 (Tenn. App. July 21, 1987).

5 See *State v. Evans*, 464 N.E. 2d 1083 (Ill. App. Ct. 1984).

6 *The Phoenix Gazette*, Tues., Feb. 7, 1995, at C1; *The Providence Journal-Bulletin*, Thurs., Feb. 9, 1995, at 10F.

- 7 MODEL PENAL CODE AND COMMENTARIES § 211.2; *see* *Minor v. State*, 583 A.2d 1002 (Md. Ct. Spec. App. 1991).
- 8 MODEL PENAL CODE AND COMMENTARIES § 5.02.
- 9 *Id.* at § 5.03(1)(a)-(b).
- 10 *Id.* at § 5.01.
- 11 *Id.* at §§ 5.06-07, 223.1(2)(b), 223.6; CALIFORNIA HEALTH & SAFETY CODE § 11357(b) (West 1997).
- 12 MODEL PENAL CODE AND COMMENTARIES § 211.1(1)(c).
- 13 *Id.* at § 221.1.
- 14 *See* Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. JUST. ETHICS 53, 66 (Winter/Spring, 1986) (unlawful possession, even in theft cases, may be viewed as inchoate); G. FLETCHER, *supra* note 2, §§3.23-24, at 124-30, § 3.3, at 132 (assault and burglary may be viewed as inchoate).
- 15 Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995).
- 16 G. FLETCHER, *supra* note 2.
- 17 *See* 1 CALIFORNIA JURY INSTRUCTIONS (CRIMINAL) § 8.46 (West 1988) (crime of involuntary manslaughter demands such carelessness that the agent *must* have been aware of the excessive risk to life his actions posed).
- 18 *See* R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 233 (4th ed. 1992) (justifying the punishment of attempted crimes as the equivalent of maintaining a police force).
- 19 CALIFORNIA VEHICLE CODE § 22348 (West 1997). *But see* *Thacker v. State*, 117 S.E.2d 913 (Ga. Ct. App. 1961); *Dawes v. State*, 881 P.2d 670 (Nev. 1994). *See generally* *Jones v. Commonwealth*, 247 S.W.2d 517 (Ky. Ct. App. 1952).
- 20 MODEL PENAL CODE AND COMMENTARIES § 211.2.
- 21 *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass. 1963).
- 22 J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 177 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).
- 23 J. Thomson, *The Decline of Cause*, 76 GEO. L.J. 137, 140 (1987).
- 24 *See, e.g.,* *Thompson v. American Home Assurance Company*, 95 F.3d 429 (6th Cir. 1996). Hanging oneself (without assistance)—even with the intent to commit suicide, is non-criminal. W. LAFAVE & A. SCOTT, *supra* note 2, at 649.
- 25 Because one cannot (yet) consent to one's own death by the hand of another, *see* Dworkin, Nagel, Nozick, Rawls, Scanlon, & Thomson, *Assisted Suicide & the Court: The Philosopher's Brief*, XLIV N.Y. REV. OF BOOKS 41 (Mar. 27, 1997), "game" as I use it here excludes arrangements by which, for example, each player takes turns aiming a loaded gun at someone else. *See, e.g.,* *State v. Welch*, 681 P.2d 163 (Or. Ct. App. 1984).
- 26 354 Pa. 180 (1946).
- 27 *Malone*, 354 Pa. at 182.
- 28 *See* *People v. Sandoval*, 35 Cal. Rptr. 227 (Cal. Dist. Ct. App. 1963); *Bruce v. State*, 349 So. 2d 1068 (Miss. 1977); *State v. Flynn*, 541 S.W.2d 344 (Mo. Ct. App. 1976); *People v. Roe*, 542 N.E.2d 610 (N.Y. 1989); *State v. Van Gorder*, 641 P.2d 584 (Or. Ct. App. 1981); *Welch*, 681 P.2d at 163; *Commonwealth v. Ashburn*, 331 A.2d 167 (Pa. 1975).
- 29 *E.g.,* *People v. France*, 57 A.D.2d 432 (N.Y. App. Div. 1977); *Commonwealth v. Lang*, 426 A.2d 691 (Penn. Superior Ct. 1981).
- 30 G. GREENE, *A SORT OF LIFE* 86 (1971).
- 31 Crocker, *supra* note 2, at 91-92.
- 32 J. DRESSLER, *UNDERSTANDING CRIMINAL LAW* §14.03(C), at 173 (2d ed. 1995).
- 33 403 Pa. 571 (1961).
- 34 *Root*, at 583 (J. Eagen, dissenting).
- 35 *Root*, 403 Pa. at 579-80; *Lewis v. State*, 474 So. 2d 766 (Ala. Crim. App. 1985); *J.A.C. v. State*, 374 So. 2d 606 (Fla. 3d Dist. Ct. App. 1979); *Thacker v. State*, 117 S.E.2d 913 (Ga. App. 1961); *People v. Lemieux et al.*, 27 N.Y.S.2d 235 (Queens County Ct 1941); *State v. Uhler*, 61 Ohio Misc. 37 (Ct. of Common Pleas 1979).
- 36 320 N.W.2d 608 (Iowa 1982).
- 37 *McFadden*, 320 N.W.2d at 609.
- 38 12 Pa. D. & C. 379 (1961).
- 39 *Id.* at 382; *see* *State v. Melcher*, 487 P.2d 3 (Ariz. Ct. App. 1971); *State v. Youngblut*, 132 N.W.2d 486 (Iowa 1965); *Campbell v. State*, 285 So. 2d 891 (Miss. 1973); *State v. Patterson*, 175 N.E. 741 (Ohio 1961); *State v. McClose*, 289 N.W.2d 340 (Wis. Ct. App. 1980).
- 40 W. P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 265-69 (1988).
- 41 *See* 1 CALIFORNIA JURY INSTRUCTIONS (CRIMINAL) §§ 3.40-41; MODEL PENAL CODE AND COMMENTARIES § 2.03; W. LAFAVE & A. SCOTT, *supra* note 2, § 3.12(b), at 279-83.
- 42 *See Symposium—The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 519 (1988).
- 43 MODEL PENAL CODE AND COMMENTARIES §2.03 (2)(b).
- 44 Coffee, 'No Soul to Damn; No Body to Kick': *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).
- 45 *Compare, e.g.,* *Velazquez v. State*, 561 So. 2d 347 (Fla. Dist. Ct. App. 1990) (dicta) *with* *Goldring v. State*, 654 A.2d 939 (Md. Ct. Spec. App. 1995).
- 46 182 N.W.2d 113 (Iowa 1970).
- 47 *Shimon*, 182 N.W.2d at 115-16.
- 48 *Sena v. Turner & Attebery*, 15 Cal. Rptr. 857, 859-60 (3d Dist. Ct. App. 1961).
- 49 *Id.* at 859.
- 50 *State v. Uhler*, 61 Ohio Misc. 37 (Ct. of Common Pleas 1979).
- 51 *State v. One 1986 Subaru*, 553 A.2d 869 (N.J. Super. Ct. App. Div. 1989) (*in rem* civil forfeiture of "guilty" personal property).
- 52 *Carney v. DeWees et. al.*, 70 A.2d 142 (Conn. 1949); *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968); *Hood v. Evans*, 126 S.E. 2d 898 (Ga. Ct. App. 1962); *Haddock v. Stewart*, 192 A.2d 105 (Md. 1963); *Nelson v. Nason*, 177 N.E.2d 887 (Mass. 1961); *Boykin v. Bennett*, 118 S.E. 2d 12 (N.C. 1961); *Ogle v. Avina*, 146 N.W.2d 422 (Wis. 1966).
- 53 *E.g.,* *Weil v. Federal Kemper Life Assurance Co.*, 866 P.2d 774 (Cal. 1994) (and cases cited therein).

- 54 MODEL PENAL CODE AND COMMENTARIES §2.03 (2)(b).
- 55 *Velazquez v. State*, 561 So. 2d 347 (Fla. Dist. Ct. App. 1990); *State v. McFadden*, 320 N.W.2d 608 (Iowa 1982); *Goldring v. State*, 654 A.2d 939 (Md. Ct. Spec. App. 1995).
- 56 See 1 CALIFORNIA JURY INSTRUCTIONS (CRIMINAL) § 3.40 (West 1992 Revision).
- 57 See generally W. LAFAVE & A. SCOTT, *supra* note 2, at § 3.12, at 281-83. But see H.L.A. HART & A. HONORÉ, *supra* note 2, at 325-26.
- 58 Thomson, *supra* note 23, 140-41.
- 59 *Atencio*, 189 N.E.2d 627, 629 (Sup. Jud. Ct. of Mass. 1963).
- 60 *Id.*
- 61 *Id.*
- 62 *Id.* at 631.
- 63 For a contrary view, see S. SALTZBURG ET AL., *supra* note 2, at 652-53.
- 64 Cf. *Neitzel v. State*, 655 P.2d 325, 333 (Alaska Ct. App. 1982).
- 65 See S. CAVELL, *Music Discomposed*, in MUST WE MEAN WHAT WE SAY? 199 (1976).
- 66 See also *Barry v. State*, 369 P.2d 652, 656 (Okla. Crim. App. 1962).
- 67 "Elevator surfing" or "elevator action" is the practice of climbing atop an elevator car, knocking out the lights and riding in near darkness. Veteran surfers up the ante by hopping from one moving car to another or "helicoptering," the practice of hanging from the bottom of the car while one's body spins in a half-circle. The risks include falling several hundred feet, getting wedged between an elevator car and a wall, getting crushed by a 10,000 pound counterweight, or getting one's limbs torn off by a matrix of wheels, gears, pulleys, cables, and hooks. Roeper, 'Surfers' Wave Goodbye To All Common Sense, CHICAGO SUN TIMES, Mar. 3, 1993, at p.11. The game is social and competitive at once, but only the willing play—the chances they take are their own. Those who play with the unskilled or unlucky do not kill them, though they may feel as though they do.
- 68 For a contrary view, see Crocker, *supra* note 2, at 91-92; *Lewis v. State*, 474 So. 2d 766 (Ala. Crim. App. 1985) (dicta).
- 69 See *State v. Melcher*, 487 P.2d 3 (Ariz. Ct. App. 1971); *People v. Kemp*, 310 P.2d 680 (Cal. Dist. Ct. App. 1957); *State v. Evans*, 464 N.E. 2d 1083 (Ill. App. Ct. 1984); *Pineta v. State*, 634 A.2d 982 (Md. Ct. Spec. App. 1993); *Goldring v. State*, 654 A.2d 939 (Md. Ct. Spec. App. 1995); *Campbell v. State*, 285 So. 2d 891 (Miss. 1973); *State v. Fennwald*, 339 S.W.2d 769 (Mo. 1960); *State v. Butler*, 227 N.E.2d 627 (Ohio 1967); *State v. Patterson*, 175 N.E. 741 (Ohio 1961); *Dawes v. State*, 881 P.2d 670 (Nev. 1994); *Stallard, Bennett, & Green v. State*, 348 S.W.2d 489 (Tenn. 1961); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974).
- 70 E.g., MODEL PENAL CODE § 2.06(1)-(5); CALIFORNIA PENAL CODE § 971 (West 1997).
- 71 J. SEARLE, INTENTIONALITY 110 (1983).
- 72 Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 26 (Winter/Spring 1996).
- 73 H. L. A. HART & A. HONORÉ, *supra* note 2, at 388; L. KATZ, BAD ACTS AND GUILTY MINDS 252-53 (1987); K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 19, 55-93 (1991); Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HAST. L.J. 91, 124-25 (1985); Kadish, *supra* note 2, at 359-60; Perkins, *Parties to Crime*, 89 U. PENN. L. REV. 581, 600 (1941); Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 632 (1984); Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702-08 (1930).
- 74 Kadish, *supra* note 2, at 359-60; see *Musick v. State*, 136 S.E.2d 149 (Ga. Ct. App. 1964).
- 75 *Atencio*, 189 N.E.2d 627, 630 (Sup. Jud. Ct. of Mass. 1963).
- 76 184 So. 2d 711 (Fla. 1st D.C.A. 1966).
- 77 *Jacobs*, 184 So. 2d at 716.
- 78 84 A.D.2d 11 (N.Y. App. Div. 1981).
- 79 *Id.* at 15.
- 80 W. LAFAVE & A. SCOTT, *supra* note 2, at 673. But see *State v. Uhler*, 61 Ohio Misc. 37 (Ct. of Common Pleas 1979); *State v. Petersen*, 526 P.2d 1008 (Or. 1974).
- 81 *Abbott & Moon*, 84 A.D.2d at 15. (Emphasis added).
- 82 Yeager, *supra* note 72, at 29.
- 83 *Id.* at 31. See J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 4-11 (1974) (a proposition's "analyticity" makes it "true in virtue of its meaning, or by definition." So, "Rectangles are four-sided" is analytic, whereas "My son John is now eating an apple" is not; the latter statement is not analytic because its truth must be verified).
- 84 Yeager, *supra* note 72, at 34 n.49.
- 85 G. FLETCHER, *supra* note 2, at 654-55.
- 86 *Jacobs*, 184 So. 2d. at 717 (Carroll, J., dissenting).
- 87 1 All E.R. 464 (King's Bench Division 1951).
- 88 See Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination*, 70 TEX. L. REV. 17, 80 (1991).
- 89 Winch, *supra* note 1, at 145-50.